RECORD AND 1 BRIEFS

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IN THE

Supreme Court of the United States

MIDLAND FUNDING, LLC,

Petitioner,

v.

ALEIDA JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The undersigned *amicus curiae* is a Senior Research Scholar in Law at the Yale Law School, has served as an Adjunct Professor of Law at the Georgetown University Law Center and the New York University School of Law, and is a frequent Visiting Lecturer in Law at the Yale Law School. He has also taught at the Harvard Law School. Among other subjects, he teaches courses on bankruptcy law, domestic and international business reorganizations, commercial transactions, secured transactions, and the federal courts. In addition to his teaching, the undersigned is a contributing author of Collier on Bankruptcy, responsible for writing several chapters of the Treatise. He is also a partner at the law firm of Dechert LLP; a prior Chair of the ABA Business Bankruptcy Committee; a former member of the Judicial Conference Advisory Committee on the Federal Bankruptcy Rules; and a Fellow of the American College of Bankruptcy.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Petitioner and Respondent have filed with the Court letters consenting to the filing of *amicus curiae* briefs in support of either or neither party.

The undersigned has briefed and argued numerous bankruptcy matters before the Court, including *Schwab v. Reilly*, 560 U.S. 770 (2010); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010); *Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008); *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 549 U.S. 443 (2007); *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007); *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). He has otherwise participated as counsel for one of the parties in numerous other bankruptcy matters before the Court, including *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Hamilton v. Lanning*, 560 U.S. 505 (2010); *Central Virginia Cmty. College v. Katz*, 546 U.S. 356 (2006); *Rousey v. Jacoway*, 544 U.S. 320 (2005); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Lamie v. United States Trustee*, 540 U.S. 526 (2004); *FCC v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293 (2003); and *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992). In addition, he has prepared and filed with the Court several amicus briefs in bankruptcy cases, including *Husky International Electronics, Inc. v. Ritz*, 136 S. Ct. 1581 (2016); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686 (2015); *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015); *Clark v.*

Rameker, 134 S. Ct. 2242 (2014); *Law v. Siegel*, 134 S. Ct. 1188 (2014); *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065 (2012); *Hall v. United States*, 132 S. Ct. 1882 (2012); *Ransom v. FIA Card Servs.*, 131 S. Ct. 716 (2011); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Howard Delivery Serv., Inc. v. Zurich American Ins. Co.*, 547 U.S. 651 (2006); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004); *Archer v. Warner*, 538 U.S. 314 (2003); and *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995).

The purpose of this brief is to address matters that bear on this Court's determination of two important issues that affect the protections afforded to debtors in bankruptcy from fraudulent and exploitative conduct: (1) whether a creditor who qualifies as a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA") violates that Act by knowingly and intentionally filing a proof of claim in bankruptcy on a time-barred debt; and (2) if such conduct does fall within the scope of the FDCPA, whether Congress clearly and manifestly intended the Bankruptcy Code to preclude application of the FDCPA to the filing of proofs of claim.

As to the first issue, the knowing and intentional filing of a proof of claim on a time-barred debt is a violation of the FDCPA. As the Elev-

enth Circuit noted in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015), consumer debt buyers like petitioner in this case have filed a "deluge" of stale proofs of claim in consumer bankruptcy cases in the hope of collecting on some percentage of them. The filing of these stale claims represent attempts by debt collectors to mislead debtors into the belief that the relevant debts are legally valid when the collectors know they are unenforceable. In addition, they represent illicit efforts to play off of the presumptive good faith of most creditors who file legitimate proofs of claim on enforceable obligations. As this brief explains, courts have widely held that lawsuits seeking to enforce stale claims violate the FDCPA when the creditors know the claims are unenforceable, and proofs of claim filed on the same stale debts are fundamentally no different.

On the second issue, this brief further explains that the plain language of the FDCPA makes clear that it applies to proofs of claim, and nothing in the Bankruptcy Code makes an exception to the FDCPA in this context. This Court has made clear that it will not construe a statute as being implicitly repealed by a later statute unless Congress's intent to do so is "clear and manifest." This high burden cannot be met in this instance.

STATEMENT

Petitioner Midland Funding, LLC ("Midland") is in the business of purchasing and seeking to collect unpaid debts. Pet. App. 3a. Midland purchased a debt that Respondent Aleida Johnson ("Johnson") at one point owed to Fingerhut Credit Advantage. *Id.* The date of the last transaction on Johnson's account with Fingerhut was in May of 2003. *Id.*

Johnson filed a Chapter 13 bankruptcy petition in March of 2014. *Id.* In May of 2014, Midland filed a proof of claim in Johnson's bankruptcy case, seeking to collect $1,879.71 on the debt purchased from Fingerhut. *Id.* Midland's claim is governed by Alabama law, which imposes a six-year statute of limitations on claims to collect on an overdue debt, and therefore under Alabama law the claim is time-barred. *Id.*

Johnson commenced an action against Midland in the United States District Court for the District of Alabama, alleging that Midland's time-barred attempt to collect on the overdue debt was a violation of the Fair Debt Collection Practices Act ("FDCPA"). Pet. App. 18a-19a. The FDCPA prohibits a "debt collector" from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] . . . the character, amount, or legal status of any debt." 15 U.S.C. § 1692e. The FDCPA

further prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," including collecting any amount that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f. A "debt collector" under the statute is "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *Id.* § 1692a.

Midland moved to dismiss Johnson's claim. Pet. App. 18a. The District Court recognized that it was bound by the Eleventh Circuit's decision in *Crawford v. LVNV Funding, LLC*, 758 F.3d 1254 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1844 (2015), that filing a proof of claim in bankruptcy to collect a time-barred debt is a violation of the FDCPA. Pet. App. 19a. Nevertheless, the court held that the FDCPA prohibition on filing stale proofs of claim is in "irreconcilable conflict" with section 501(a) of the Bankruptcy Code, which provides in permissive terms that "[a] creditor . . . may file a proof of claim." 11 U.S.C. § 501(a). The court held that where, as is the case under Alabama law, a statute of limitations period only extinguishes a creditor's remedy but not the underlying right to payment, a creditor has the right to file a proof of claim on a time-barred debt under section 501. Pet. App. 22a. The court then found that this right is in conflict with the FDCPA because a creditor may

comply with the FDCPA only by "surrendering its right under the Code to file a proof of claim on a time-barred debt." Pet. App. 33a. Because the Bankruptcy Code was enacted after the FDCPA, the court held that the former impliedly repealed the latter. Pet. App. 31a, 37a.

On appeal, the Eleventh Circuit reversed. The court first noted that it had faced a "nearly identical" question in *Crawford* and confirmed its decision in that case that filing a stale proof of claim in bankruptcy constitutes a violation of the FDCPA. Pet. App. 5a. The Eleventh Circuit also disagreed with the lower court's conclusion that the FDCPA and the Bankruptcy Code conflicted irreconcilably. Pet. App. 7a. The court held that the FDCPA and the Bankruptcy Code "differ in their scopes, goals, and coverage, and can be construed together in a way that allows them to coexist." Pet. App. 11a. The Bankruptcy Code allows—but does not require—all creditors to file proofs of claim, while the FDCPA prohibits those creditors that qualify as "debt collectors" from filing stale proofs of claim. Pet. App. 12a, 14a. Reasoning that the Bankruptcy Code's filing rules "do not shield debt collectors from the obligations that Congress imposed on them," the Eleventh Circuit concluded that a debt collector that chooses to file a time-barred proof of claim "is simply opening himself up to a potential lawsuit for an FDCPA violation." Pet. App. 13a-14a.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit correctly held that Midland violated the FDCPA by filing a proof of claim for a time-barred debt in Johnson's bankruptcy proceeding and that the Bankruptcy Code did not implicitly repeal the FDCPA as to proofs of claim filed in bankruptcy. Federal courts have widely recognized that filing or threatening to file a lawsuit to collect a debt that is barred by the applicable statute of limitations is a violation of the FDCPA. *See, e.g., Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013). A proof of claim filed in a bankruptcy proceeding is the equivalent of a lawsuit to collect a debt and, like a separately filed lawsuit, filing a proof of claim for a time-barred debt is an act to collect a debt "which the debt collector knows or should know is unavailable or unwinnable" and "is the kind of abusive practice the FDCPA was intended to eliminate." *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 876 (N.D. Ill. 2009) (citation and quotation marks omitted). Midland's attempts to distinguish the two scenarios fall short, and the decision below holding that the filing of a stale proof of claim violates the FDCPA should be affirmed.

Furthermore, the Bankruptcy Code in no way precludes application of the FDCPA to stale proofs of claim. The starting point for all statutory interpretation is the text of the statute itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526,

534 (2004). On its face, the FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. § 1692e, and from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," *id.* § 1692f. There is no exception in these provisions for debt collectors acting within a bankruptcy proceeding, and the statute therefore clearly applies to misleading, unfair, or unconscionable attempts to collect a debt through a proof of claim. Further, nothing in the Bankruptcy Code excepts application of the FDCPA to a debt collector filing a proof of claim, and the provisions are not "irreconcilably conflicted" such that this Court should infer repeal of the FDCPA by the Code. Moreover, it is a cardinal rule of statutory construction that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation and quotation marks omitted). Here there is no evidence that Congress intended the Code to repeal the FDCPA in this setting, let alone evidence sufficient to satisfy the "clear and manifest" standard. Where, as here, two statutes may coexist and the requisite intent to infer repeal does not exist, the courts must regard both provisions as effective. *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001).

The Eleventh Circuit properly did so, and this Court should affirm.

ARGUMENT

I. Knowingly Filing A Proof Of Claim For A Time-Barred Debt Is A Violation Of The FDCPA.

A. Filing a Proof of Claim is an Act to Collect a Debt Analogous to Filing a Traditional Debt-Collection Lawsuit.

Federal courts have widely held that filing or threatening to file a lawsuit to collect a time-barred debt is a violation of the FDCPA. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1079 (7th Cir. 2013); *accord Buchanan v. Northland Grp., Inc.*, 776 F.3d 393, 399-400 (6th Cir. 2015) (letter offering settlement of time-barred claim was a violation of FDCPA because "consumers might still be confused about the enforceability of a debt"); *Huertas v. Galaxy Asset Mgmt.*, 641 F.3d 28, 33 (3d Cir. 2011) (recognizing that threatened or actual litigation on a time-barred debt is a violation of the FDCPA, but finding no threat of litigation); *Castro v. Collecto, Inc.*, 634 F.3d 779, 783 (5th Cir. 2011) (recognizing that "threatening to sue on time-barred debt may well constitute a violation of the FDCPA," but finding that claim was not time-barred); *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767, 771 (8th Cir. 2001) (same as

Huertas).[2] As one court has explained, "bringing or threatening to bring a lawsuit 'which the debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.'" *Herkert*, 655 F. Supp. 2d at 876 (quoting *Ramirez v. Palisades Collection LLC*, No. 07-3840, 2008 WL 2512679, at *5 (N.D. Ill. June 23, 2008)); *see also Beattie*, 754 F. Supp. at 393 ("[T]he [FDCPA] was designed to prevent debt collectors from threatening suit against persons whom the collector knows or should know are not legally liable for a debt."). As these decisions recognize, a lawsuit premised or threatened on the basis of a stale claim is an abuse of the litigation system. A proof of claim premised on the basis of a stale claim is fundamentally no different.

In all material respects, the act of filing a proof of claim in a bankruptcy case is the func-

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[2] *See also Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 875 (N.D. Ill. 2009); *Larsen v. JBC Legal Grp., P.C.*, 533 F. Supp. 2d 290, 302 (E.D.N.Y. 2008); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 272 (D. Conn. 2005); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383, 393 (D. Del. 1991); *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

tional equivalent of commencing litigation to collect a debt outside the bankruptcy process. To begin with, a debtor commences a court-supervised bankruptcy case by filing a bankruptcy petition. 11 U.S.C. § 301. In turn, the filing of the petition triggers the automatic stay, which generally bars creditors from pursuing debt-collection activity outside the bankruptcy process. 11 U.S.C. § 362.

In lieu of pursuing immediate litigation outside the bankruptcy process, creditors may, but are not required to, file proofs of claim setting forth the debts they assert they are owed. 11 U.S.C. § 501(a). The point is to give creditors who are stayed from pursuing legitimate debt-collection activity outside the bankruptcy system an opportunity to assert legitimate claims through the proof of claim procedure. In other words, the point is to provide a means for the creditor to be paid something on its claim, a classic debt-collection activity. In the event a creditor invokes the bankruptcy debt-collection procedure improperly by filing a proof of claim seeking to collect an unenforceable debt, the Code clearly provides that such claims must be disallowed. 11 U.S.C. § 502(b)(1). And the fact that such claims must be disallowed under section 502 dramatically undercuts any notion that it is somehow legitimate for creditors to file such claims in the first instance.

Although the proof of claim process acts generally as a non-bankruptcy litigation substitute, the filing of a proof of claim can easily morph into formal debt-collection litigation, either within or outside the bankruptcy court. For example, where a creditor has filed a proof of claim, relief from stay may be granted so that the claim may be liquidated in a traditional litigation forum, leaving only the consideration of unique aspects of bankruptcy law to be adjudicated in the bankruptcy court. *See, e.g., Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 91 (3d Cir. 1997) (allowing relief from stay to "expedite the resolution of [the state tort] claim by eliminating it if [the debtor] prevails on appeal, or by rendering it final and nondischargeable if [the plaintiff] prevails"); *In re Chacon*, 438 B.R. 725, 736 (Bankr. D. N.M. 2010) ("A number of courts have . . . come up with the same solution: permit the liability and damages issues to be determined either in the state court or the U.S. district court, and then have the parties return to the bankruptcy court as needed for an adjudication of the dischargeability issue."); *In re Cummings*, 221 B.R. 814, 819 n.9 (Bankr. N.D. Ala. 1998) ("Numerous courts have determined that, under appropriate circumstances, a bankruptcy court may grant relief from the stay to allow a debt to be liquidated in a pending state court proceeding, and then make a determination of dischargeability based on the state court record."). In such circumstances where relief from stay has been granted

and the creditor pursues a time-barred lawsuit against the debtor, the creditor's claim would obviously be subject to any statute of limitations defense, and the pursuit of the litigation itself may well violate the FDCPA under the precedents discussed above. *See, e.g., Phillips*, 736 F.3d at 1079; *Kimber*, 668 F. Supp. at 1487 (finding an FDCPA violation because "time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy").

Alternatively, creditors may file proofs of claim and have their claims adjudicated entirely in the bankruptcy court. Once again, such proofs of claim are likewise subject to any available statute of limitations defense and, if time-barred, must be disallowed as unenforceable under section 502 of the Bankruptcy Code. 11 U.S.C. § 502(b)(1). The question is whether, for purposes of the FDCPA, debt-collection activity involving the filing of a proof of claim should be viewed differently from the very non-bankruptcy debt-collection activity that the proof of claim process substitutes for and closely tracks. The answer is that, for purposes of the FDCPA, there is simply no basis for treating them differently.

To begin with, just like a debt collector who threatens or commences a traditional lawsuit on a debt he knows is stale, a debt collector who knowingly files a proof of claim for a time-barred debt is plainly seeking to collect a debt that the

collector "knows or should know is unavailable or unwinnable by reason of a legal bar." *Herkert*, 655 F. Supp. 2d at 876 (citation and quotation marks omitted). Such conduct is precisely "the kind of abusive practice the FDCPA was intended to eliminate." *Id.*; *see also Beattie*, 754 F. Supp. at 393. Thus, a debt collector's filing of a proof of claim on a debt he knows is time-barred is similarly "unjust and unfair as a matter of public policy" and violates the FDCPA for the same reasons applicable to a traditional debt-collection lawsuit. *Kimber*, 668 F. Supp. at 1487; *see also McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) ("Whether a debt is legally enforceable is a central fact about the character and legal status of that debt. A misrepresentation about that fact thus violates the FDCPA.").

The parallel between a proof of claim and a traditional debt-collection lawsuit is even more apparent in the scenario in which a debtor in bankruptcy objects to a proof of claim and files a counterclaim. A claim combined with an objection and counterclaim gives rise to an "adversary proceeding" under the Bankruptcy Rules, which is just the bankruptcy term for what amounts to a traditional lawsuit commenced by a summons and complaint. *See* FED. R. BANKR. P. 3007(b); FED. R. BANKR. P. 7001 (defining adversary proceedings); *see also, e.g., Mulvania v. United States (In re Mulvania)*, 214 B.R. 1, 7 (B.A.P. 9th

Cir. 1997) (objection to claim joined with request to determine validity of lien is an adversary proceeding).

Notably, an adversary proceeding is a separate piece of litigation from the overarching bankruptcy case and in large part mirrors litigation that occurs outside the bankruptcy context. *See, e.g., Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 457 (2004) (Thomas, J., dissenting) ("The similarities between adversary proceedings in bankruptcy and federal civil litigation are striking."); *Estancias La Ponderosa Dev. Corp. v. Harrington (In re Harrington)*, 992 F.2d 3, 6 n.3 (1st Cir. 1993) (noting "[t]he great similarity between an adversary proceeding in bankruptcy and an ordinary civil action"). The Bankruptcy Rules incorporate the Federal Rules of Civil Procedure in adversary proceedings, making discovery and pretrial procedure in an adversary proceeding largely identical to that in traditional civil litigation. *See* FED. R. BANKR. P. 7016 (adopting FED. R. CIV. P. 16 regarding pretrial conferences); FED. R. BANKR. P. 7026-7037 (adopting discovery rules in FED. R. CIV. P. 26 to 37). Post-trial procedures to alter or amend a judgment or move for a new trial are also the same in an adversary proceeding as in civil litigation. FED. R. BANKR. P. 7052, 9023, 9024. The filing of a proof of claim, therefore, can easily give rise to a distinct piece of litigation virtually indistinguishable from ordinary civil litigation. Because of these similarities, it would be illogical

to recognize the applicability of the FDCPA with respect to debt-collection activity involving an ordinary lawsuit but not debt-collection activity involving a proof of claim.

B. Midland's Proffered Reasons to Preclude Application of the FDCPA to Proofs of Claim are Equally Applicable to, and Have Long Been Rejected in the Context of, Traditional Debt-Collection Lawsuits.

In spite of the similarities between the filing of a proof of claim on a stale debt and a traditional lawsuit premised on the same stale debt, Midland nonetheless insists that the filing of a proof of claim cannot be a violation of the FDCPA because "[d]ebt recovery within bankruptcy is fundamentally different from debt collection outside bankruptcy." Pet. Br. 34. None of the "differences" that Midland identifies, however, justify creating an exception under the FDCPA for the filing of proofs of claim on debts that are known to be stale.

According to Midland, "debtors in bankruptcy are protected by a panoply of procedures," including the assignment of a trustee (and often counsel) to object to claims, regulations governing the content of proofs of claim and the procedures for administering them, and sanctions for abusive conduct. Pet. App. 31-32. But similar protections exist for debtors outside of bankruptcy. And just as none of these protections excuse

application of the FDCPA in traditional litigation, the protections Midland identifies do not excuse the application of the FDCPA to debt-collection activity involving a proof of claim.

For example, under both state and federal law, traditional complaints must meet all applicable pleading standards or risk dismissal. *See, e.g.*, FED. R. CIV. P. 8(a)(2) (a complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief"); ALA. R. CIV. P. 8(a) (same); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissing a complaint that did not provide "enough facts to state a claim to relief that is plausible on its face"). Moreover, where counsel are involved, they must certify that the relevant pleadings are true and well-founded. For example, an attorney signing a pleading in federal court certifies that a reasonable inquiry has been made regarding the truth of the factual allegations contained therein, the claims are warranted, and the pleading is not motivated by an improper purpose. FED. R. CIV. P. 11; *see also, e.g.*, ALA. R. CIV. P. 11. Under these standards, knowingly filing a time-barred lawsuit has been held to be sanctionable conduct. *See Kimber*, 668 F. Supp. at 1488 (citing cases). But that does not mean that the FDCPA also does not apply.

By the same token, the mere fact that certain bankruptcy procedures may also shield a debtor

from certain kinds of harm arising from illegitimate proofs of claim is not sufficient reason to excuse application of the FDCPA, which has its own focus and remedial scope. The relevant inquiry in determining if a debt-collection action violates the FDCPA is whether a debt collector's conduct is misleading or deceptive, not whether other potential safeguards are in place to further combat abuses. *See, e.g., Freyermuth*, 248 F.3d at 771 ("The case law on this issue focuses on the debt collector's actions, and whether an unsophisticated consumer would be harassed, misled or deceived by them.").

Midland also contends that the FDCPA does not apply to proofs of claim premised on time-barred debts because a creditor has the right under the Bankruptcy Code to file a proof of claim and the debtor may always raise any applicable statute of limitations as a defense. Pet. Br. 18-19. But the same thing can be said of traditional debt-collection litigation: the creditor has the right to file a complaint and the debtor may raise any applicable statute of limitations as a defense. *See Goins*, 352 F. Supp. 2d at 272. Notably, courts have consistently rejected this argument as a reason to avoid application of the FDCPA to time-barred lawsuits. *Id.* (although statute of limitations is an affirmative defense that can be waived, it is "a complete defense" and "the threat to bring a suit under such circumstances can at best be described as a 'misleading'

representation"); *Kimber*, 668 F. Supp. at 1488 (rejecting assertion that "because a statute of limitations is an affirmative defense which is waived if not raised, a plaintiff may not be penalized for knowingly filing a time-barred suit"). The same reasoning applies to proofs of claim.

II. The FDCPA Covers Proofs Of Claim Premised on Stale Debts Filed In Bankruptcy Proceedings.

A. The Plain Meaning of the FDCPA Compels its Application in the Claims Process.

In construing and applying a statute, "[t]he starting point . . . is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)); *see also United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989) ("The task of resolving the dispute over the meaning of [the statutory provision at issue] begins where all such inquiries must begin: with the language of the statute itself."). In addition, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and quotation marks omitted); *see also Rake v. Wade*, 508 U.S. 464, 471 (1993); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). That is because a cardinal

presumption is that Congress "says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 254. Similarly, courts must also generally refrain from engrafting limitations on statutory provisions that do not appear in its text. *See, e.g., Lamie*, 540 U.S. at 538.

On its face, the FDCPA prohibits debt collectors from "us[ing] any false, deceptive, or misleading representation or means in connection with the collection of any debt," including "false[ly] represent[ing] . . . the character, amount, or legal status of any debt," 15 U.S.C. § 1692e. The FDCPA also prohibits a debt collector from "us[ing] unfair or unconscionable means to collect or attempt to collect any debt," including collecting any amount that is not "expressly authorized by the agreement creating the debt or permitted by law." *Id.* § 1692f. There is no exception in the statute for filing proofs of claim in a bankruptcy proceeding. Rather, the FDCPA provides its own protections by expressly applying only to creditors that qualify as "debt collectors" and allowing a safe harbor for those debt collectors whose violations are "not intentional and resulted from a bona fide error." *Id.* § 1692k(c).

A debt collector who knowingly attempts to collect a claim by filing a proof of claim premised on a time-barred debt violates the FDCPA no less than a debt collector who knowingly threat-

ens to file or files a traditional lawsuit premised on the same time-barred debt. Both acts fall squarely within the plain terms and remedial scope of the FDCPA, and this Court should enforce the statute according to its plain terms. *Hartford Underwriters*, 530 U.S. at 6. To read into the statute an exception for proofs of claim filed with a bankruptcy court would improperly apply a limitation to the statute that simply does not exist. *See Lamie*, 540 U.S. at 538.

B. Nothing in the Bankruptcy Code Prevents the Application of the FDCPA to a Proof of Claim for a Time-Barred Debt.

The Bankruptcy Code does not supply the full universe of laws and rules that govern the conduct of bankruptcy proceedings. *See, e.g.*, 28 U.S.C. § 959(b) (requiring any trustee, receiver, or debtor in possession to "manage and operate the property in his possession . . . according to the requirements of the valid laws of the State in which such property is situated"); *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Prot.*, 474 U.S. 494, 507 (1986) (finding that "[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety" as required by state law). Although it is certainly true that provisions such as the automatic stay proscribe certain conduct, it is equally true that Congress did not intend for

parties in bankruptcy "to have *carte blanche* to ignore nonbankruptcy law." *Id.* at 502.

Section 501 of the Bankruptcy Code provides that "a creditor . . . *may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). This provision is permissive, not mandatory. In comparison, the FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation" or "unfair or unconscionable means" to collect a debt, 15 U.S.C. §§ 1692e, 1692f, unless the debt collector can show by a preponderance of the evidence that its FDCPA violation "was not intentional and resulted from a bona fide error," *id.* § 1692k(c). Nothing in section 501 creates an exception to the FDCPA for creditors filing proofs of claim in bankruptcy proceedings or suspends the operation of the FDCPA in the bankruptcy context. As this Court has stated, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551 (1974).

As there is nothing in the language of section 501 that negates application of the FDCPA to debt collectors who file proofs of claim that are "false, deceptive, or misleading" or "unfair or unconscionable," application of the FDCPA should continue in the absence of a clearly stated

congressional expression to the contrary. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("It will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed."); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) (party contending Congress changed settled law has burden of showing intent). There is no such expression in section 501 (or anywhere else in the Bankruptcy Code), and this Court should accordingly conclude that both laws are effective.

C. The Enactment of the Bankruptcy Code Did Not Impliedly Repeal the FDCPA as it Applies to Proofs of Claim.

A cardinal rule of statutory construction that has often been repeated by this Court is that repeals by implication are not favored and will not be found unless the congressional intent to repeal is "clear and manifest." *Red Rock v. Henry*, 106 U.S. 596, 602 (1883); *accord Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). The party urging repeal "bears a heavy burden of persuasion" in establishing such intent, *Amell v. United States*, 384 U.S. 158, 165 (1966), and this Court has stated repeatedly that "repeals by implication are not favored." *Nat'l Ass'n of Home*

Builders, 551 U.S. at 662 (citation and quotation marks omitted); *see also Branch v. Smith*, 538 U.S. 254, 273 (2003); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). This Court has made clear that it "will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 (alterations in original) (citations and quotation marks omitted).

This Court has identified two specific situations in which repeal by implication may occur: "where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch*, 538 U.S. at 273 (quoting *Posadas*, 296 U.S. at 503). Midland does not claim that section 501 of the Bankruptcy Code covers the whole subject of, or is clearly intended to substitute for, the FDCPA. Midland's sole contention is that the statutes "irreconcilably conflict" and that the FDCPA must yield to the later-enacted Bankruptcy Code. *See* Pet. Br. 43-44.

Irreconcilability may be found only where it is "impossible for both provisions under consideration to stand." *Wilmot v. Mudge*, 103 U.S. 217, 221 (1880); *see also Morton*, 417 U.S. at 550 (no implied repeal where the statutes in question "can readily co-exist"). Under this stringent standard, courts may find irreconcilable conflict only where there is "a clear repugnancy between the old law and the new." *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 457 (1945), *reh'g denied*, 324 U.S. 890 (1945); *accord Tennessee Valley Auth.*, 437 U.S. at 190. Where a party advocating for repeal fails to meet the heavy burden of demonstrating that two statutes cannot, under any circumstances, be reconciled, courts must apply both provisions. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) ("[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." (quoting *Morton*, 471 U.S. at 551)); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) ("It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem.").

Under its longstanding precedents, this Court should not infer repeal of the FDCPA as to proofs of claim filed in bankruptcy unless such a inference "is absolutely necessary . . . in order that

the words of the [Bankruptcy Code] shall have any meaning at all." *Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Midland, of course, cannot meet the heavy burden of showing such a necessity exists because the Bankruptcy Code simply does not prohibit what the FDCPA directs. Once again, section 501 merely provides that "a creditor . . . *may* file a proof of claim." 11 U.S.C. § 501(a) (emphasis added). In contrast, the FDCPA prohibits a "debt collector" from using "any false, deceptive, or misleading representation" or "unfair or unconscionable means" to collect a debt. 15 U.S.C. §§ 1692e, 1692f. A "debt collector" is defined as "any person . . . in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." *Id.* § 1692a. Thus, while creditors generally are permitted to file proofs of claim in a debtor's bankruptcy proceeding, the select creditors who also qualify as "debt collectors" violate the FDCPA by knowingly and intentionally choosing to file a proof of claim on a time-barred debt.

Debt collectors can easily comply with both the Bankruptcy Code and the FDCPA, and it is therefore in no way "impossible for both provisions . . . to stand." *Wilmot*, 103 U.S. at 221. A debt collector is free to choose to file only proofs of claim that do not violate the FDCPA. The two provisions clearly "are capable of coexistence,"

and it therefore "is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Ag Supply, Inc.*, 534 U.S. at 143-44.

But even if the FDCPA and the Bankruptcy Code could be said to "irreconcilably conflict" in some sense, repeal by implication is still not appropriate unless the legislature's intent to cause such a result is "clear and manifest." *Posadas*, 296 U.S. at 503; *see also Nat'l Ass'n of Home Builders*, 551 U.S. at 662; *Rodriguez*, 480 U.S. at 524. As the court below acknowledged, and Midland does not dispute, there was no "clear and manifest" Congressional intent to repeal the FDCPA with the enactment of the Bankruptcy Code. Pet. App. 14a ("Congress never expressed a 'clear and manifest' intent to repeal the protections of the FDCPA when it enacted the Bankruptcy Code only a year later."). In fact, Midland essentially concedes that the burden of establishing "clear and manifest" intent is not met here, but claims that because the conflict "has arisen through judicial interpretation, Congress had no reason specifically to address that application [of the FDCPA] when it enacted the Bankruptcy Code," and that addressing the conflict at that time in fact "would have required an act of clairvoyance." Pet. Br. 43. In support of this assertion, Midland cites *United States v. Fausto*, 484 U.S. 439 (1988), but that case in no way excuses the requirement of "clear and manifest" intent to

infer a statute's repeal. In *Fausto*, the Court held that the Civil Service Reform Act ("CSRA"), under which certain employees have no administrative or judicial review of adverse personnel actions, precluded such employees from seeking judicial review of a personnel action based on the Back Pay Act. *Id.* at 447. While the Court held that there was no need for an "express statement" of repeal, *id.* at 453, the Court found ample support in the purpose behind the CSRA and the language of the act as a whole to conclude that Congress intended to preempt application of the Back Pay Act to personnel actions governed by the CSRA. *See id.* at 447 ("In the context of the entire statutory scheme, we think it displays a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter."). No similar indicia of intent are present with respect to the relevant statutes here, and Midland simply cannot circumvent the well-established criteria that clear and manifest intent must exist for the Court to find an implied repeal. *See, e.g., Morton*, 417 U.S. at 550 (declining to find implied repeal where "nothing in the legislative history . . . indicates affirmatively any congressional intent to repeal").

CONCLUSION

For the foregoing reasons, as well as those briefed by Respondent, the decision of the court below should be affirmed.

Respectfully submitted,

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